In the Supreme Court of the United States

No. 184

THE STANDARD OIL COMPANY,
an Ohio Corporation,
Appellant,

vs.

C. EMORY GLANDER,
Tax Commissioner of Ohio, and
JOHN A. ZANGERLE,
Auditor of Cuyahoga County, Ohio,
Appellees,

JOHN W. PECK,
Tax Commissioner of Ohio, and
JOHN J. CARNEY,
Auditor of Cuyahoga County,
Substituted Appellees.

BRIEF OF APPELLANT OPPOSING APPELLEES' STATEMENT AND MOTION TO DISMISS OR AFFIRM.

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In reply to appellees' contention that no substantial Federal question is presented by this appeal, we respectfully submit the following:

1. Appellees argue that the decisions of this Court establish that the state of domicile of the owner has jurisdiction to tax the full value of boats, unless the boats are used exclusively within a single other state.

While the decisions cited by appellees do so hold, appellees fail to mention the fact that at the time when these decisions were rendered, this Court also held that the jurisdiction of the state of domicile to tax such boats was exclusive. See *Hays v. The Pacific Mail Steamship Company*,

17 How. 596 (1855), and other cases cited by appellees. At that time, this Court also held that if a boat was used exclusively within a single other state, the jurisdiction of that state to tax was exclusive (*Old Dominion S. S. Co. v. Virginia*, 198 U. S. 299 (1905); *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194 (1905)). Both of these holdings resulted in a boat being subject to one tax on its full value, but no more.

This Court has now decided in *Ott v. Mississippi Valley Barge Company*, 336 U. S. 169 (1949), that river boats which are used regularly in a number of states other than the domicile of their owner, may be taxed by each of these states on an apportioned basis.

The question presented by the instant case is whether, in view of the *Ott* decision, the state of domicile of the owner *still* has jurisdiction to tax the full value of such boats. If it does have such jurisdiction, then, as indicated by the Ohio Supreme Court, boats may be subject to a total of two taxes on their full value, instead of one. We submit that whether this result is consistent with due process is a most substantial Federal question, not yet answered by this Court.

2. Appellees rely on the decision of this Court in *Northwest Air Lines, Inc. v. Minnesota*, 322 U. S. 292 (1944). However, they lose sight of the fact that, in the very part of the opinion of Mr. Justice Frankfurter in that case which they quote, the learned Justice points out that it was not shown "that a defined part of the domiciliary corpus has acquired a permanent location, i.e. a taxing situs, elsewhere."

While this was true in the *Northwest* case, it is not true in the instant case. In the instant case, unlike the *Northwest* case, the record *does* show that the boats of appellant have acquired a taxing situs on an apportioned basis in each of the river states in which they are regularly used. The record shows clearly and explicitly the regular use of

appellant's boats on the waters of other states, the exact routes traveled through these states, and the mileages and barrel-mileages involved in each route. We submit that the record in this regard is indistinguishable from the record in the *Ott* case, which was expressly held by this Court to establish a taxing situs in the various non-domiciliary states in which the boats there involved were used.

The question is therefore squarely presented in the instant case whether tangible property which has acquired, at least on an apportioned basis, a "taxing situs elsewhere" may still be taxed on a full value basis in the state of domicile of the owner.

3. Appellees seek to distinguish the instant case from the *Ott* case, and to assimilate it to the *Northwest* case, by arguing that the "home port" of appellant's boats was in Ohio, and that these boats were not outside Ohio throughout the year.

So far as concerns the "home port" argument, the facts that led this Court to conclude in the *Northwest* case that Minnesota, the state of domicile, was "the home state of the fleet, as a business fact," are not present here. None of the barrel-mileage of the boats is in Ohio, they never load or unload cargo in an Ohio port, and they are never drydocked or put in for major repairs in Ohio, but only at down-river points. While it is true that the boats are registered from Cincinnati, the record shows that this has no particular significance and that the boats could equally well have been registered from any point (R. I, 79). Registry is a formality required by federal law which has some significance under the Federal Navigation and Ship Mortgage Laws (46 U. S. C. 17 and 18), but has no significance under any state law. Moreover, this Court has repeatedly held that the port of registry has no controlling significance with respect to jurisdiction to tax (*Ayer & Lord v. Kentucky,* 202 U. S. 409 (1905); *Southern Pacific Co. v. Kentucky,* 222 U. S. 63, 68 (1911)).

With regard to appellees' argument that the boats are not outside Ohio throughout the year, there is no question that, as above stated, all the transportation of cargo by the boats occurs outside Ohio, and that they never load or unload cargo in an Ohio port. The only time when any of the boats even arguably enters Ohio is on those sporadic occasions when it puts into Cincinnati, as it might to any other river port, for food or minor repairs.

Even if the .7 of 1% of the mileage, or the 1.27% of the barrel-mileage, through waters of the Ohio River bordering on Ohio, which waters are actually part of Kentucky, were viewed as being within Ohio, this would not make the boats taxable in Ohio, except perhaps to the extent of .7 of 1% or 1.27%. This is shown by the case of *Union Refrigerator Transit Co. v. Kentucky, ante,* set forth in our Jurisdictional Statement, which holds that the state of domicile of a railroad car company, in which state an average of only one to three percent of the cars were used during the year, violated the due process clause when it attempted to tax the full value of the fleet. Since, under the *Ott* case, the same rule governing the taxation of rolling stock also applies to river boats, the *Union Refrigerator Transit* case is here exactly in point.

4. Appellees stress the fact that none of the river states has yet assessed appellant's boats and barges for the years in question. Apart from the fact that the State of Kentucky has asserted the right to tax the boats on an apportioned basis, and that the statutes of Kentucky and some of the other river states provide for such a tax, it is clear that jurisdiction of one stae to tax property does not depend on whether some other state has in fact taxed the same property. As this Court stated in *Morgan v. Parham,* 16 Wall. 471, 478:

> "Whether the Steamer Frances was actually taxed in New York during the years 1866 and 1867 is not shown by the case. It is not important. She was liable to taxation there."

We accordingly submit that the Federal question involved in the instant case is a very substantial and important one, and that the Motion of Appellees to Dismiss or Affirm should be overruled.

Respectfully submitted,

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